Hong Kim Sui & Anor. v. *Malayan Banking Bhd.*[4] In *Peninsular Land Development Sdn. Bhd.* v. *K. Ahmad (No. 2), supra,* the respondent had (as in this case) obtained a summary judgment under Order 14A against appellants on a specially indorsed writ relating to an agreement for sale of land. The appellants' appeal to the Federal Court was dismissed. (See [1970] 1 M.L.J. 149). The appellants sought leave to appeal to the Yang di-Pertuan Agong and it was argued by the respondent that the judgment was not a final judgment. It was held that the judgment was a final judgment.

We have considered the effect of Order 54 rule 22A which reads:

"Any party dissatisfied with any order made by a judge in Chambers may apply, at the time the order is made, orally, or at any time within four days from the day of the order in writing to the Registrar, for the adjournment of the matter into court for further argument; and on such application, the judge may either adjourn the matter into court and hear further argument, or may certify in writing that he requires no further argument. If the judge hears further argument he may set aside the order previously made, and make such other order as he thinks fit."

If the term "any order" therein includes both interlocutory and final order, then that rule is in conflict with section 68(2) of the Courts of Judicature Act.

This rule, together with the other Rules of the Supreme Court came into force on April 1, 1958 (see L.N. 42 of 1958).

Section 4 of the Courts of Judicature Act provides that where there is any inconsistency between the Act and any other written law other than the Constitution, in force at the commencement of the Act, the provisions of the Act shall prevail. The Act came into force in March 1964 (apart from section 5 which came into effect earlier and is irrelevant for our purposes).

Our attention has been drawn since the argument of this appeal, to the judgment of this court, *Arumugam Pillai* v. *Government of Malaysia,*[5] in which another panel of this court decided that the words "any order" in the old Order 54 rule 22A must mean and include a final order.

In view of our reading of the effect of section 4 of the Courts of Judicature Act we are of the considered opinion that the objection raised by the respondent should be dismissed with costs.

Objection dismissed.

Solicitors: *Lewis & Co.; Kamaluddin Maamor & Co.*

WONG YOON CHAI v. LEE AH CHIN

[F.C. (Raja Azlan Shah C.J. (Malaya), Syed Othman & Abdul Hamid F.JJ.) October 11 & November 26, 1980]

[Johore Bahru — Federal Court Civil Appeal No. 151 of 1980]

Practice and Procedure — Application for foreclosure of charged land dismissed — No order made for delivery of issue document of title and discharge of charge — Application made by summons-in-chambers — Application should have been made by originating summons — Irregularity — R.S.C. 1957, O. 54 r. 22, O. 55 r. 5A & O. 70 r. 1.

Contract — Moneylending transaction — Application for foreclosure of charged land dismissed — Claim for restitution of money lent — Claim dismissed — Contracts Act, 1950, s. 66.

The appellant had applied for foreclosure of charged land arising from a moneylending transaction and the application had been dismissed. No consequential orders were made. Subsequently the respondent applied by summons in chambers for an order for the delivery of the issue document of title, the discharge of the charge and the cancellation of the memorial of the charge. In the same proceedings the appellant claimed restitution. The learned judge of the High Court gave orders in terms of the respondent's application but dismissed the appellant's claim for restitution. The appellant appealed.

Held: (1) the application of the respondent should have been made by originating summons but the failure to comply with the procedure laid down under the Rules of the Supreme Court was only an irregularity which was curable under Order 70 rule 1 of the Rules;

(2) in this case the appellants could not have been ignorant of the fact that he had breached the Moneylenders Ordinance and therefore there could not be an order for restitution.

Case referred to:-

(1) *Menaka* v. *Lum Kum Chum* [1977] 1 M.L.J. 91.

FEDERAL COURT.

T.H. Chong (*K.H. Chong* with him) for the appellant.

Elyas Majeed for the respondent.

Cur. Adv. Vult.

Abdul Hamid F.J. (delivering the judgment of the Court): This is an appeal against the whole of the decision of the High Court, Johore Bahru ordering the chargee (appellant in this case) to deliver to the chargor (respondent in this case) the issue of document of title, namely, Certificate of Title No. 8320 for Lot No. 5688, Mukim of Senai/Kulai, the discharge of charge and the memorial of the said charge be cancelled both on the original document of title with the Registrar of Title and the issue of document of title relating to the charge.

The respondent applied for the orders after appellant's application by way of Originating Summons (No. 242/77) for foreclosure action arising from a moneylending transaction was dismissed by Anuar J.

The application was made by way of summons-in-chambers. In the supporting affidavit the respondent affirmed that his counsel through inadvertence, had failed to apply for the consequential orders. The appellant contended that the foreclosure action was dismissed merely on point of law and claimed restitution in the sum of $12,693.50.

Yusoff J. gave orders in terms of the respondent's application. He dismissed the appellant's claim

holding that the matter of restitution was *res judicata* and the court had no jurisdiction to reopen the issue for further arguments. He pointed out that the learned judge who dismissed the originating summons also refused the appellant's application for further argument under Order 54 rule 22 of the Rules of the Supreme Court (R.S.C.). A certificate was issued on November 15, 1979. No appeal was lodged and that put an end to the litigation.

Mr. T.H. Chong, counsel for the appellant, contended that the respondent's application for consequential orders could not be proceeded with by way of summons-in-chambers as the original application by the appellant for sale of the land was dismissed by Anuar J. and the matter therefore was duly disposed of and ceased to be pending.

There is merit in the appellant's contention indeed we find that the law on this point is clear. "A summons-in-chambers cannot be issued except in a pending cause or matter, *Re Sin Teck Hong Oil Mills Ltd.* [1950] M.L.J. 232." (*Mallal's* Supreme Court Practice page 747.)

The matter can no longer be said to be pending after the appellant's application for sale of land was finally disposed of by Anuar J. The respondent opposed the application but did not raise the question of consequential orders in his affidavit affirmed on March 5, 1978. He also failed to apply for the orders at the hearing of the originating summons after it was dismissed. Strictly he ought to have proceeded by way of originating summons.

Furthermore, the effect of the respondent's application was to secure a reconveyance of mortgaged property and appropriately such application should be by way of originating summons pursuant to Order 55 rule 5A R.S.C. See *Mallal's* Supreme Court Practice page 778 under the subhead "Discharge of Charge" where it is stated that —

"*Discharge of Charge* — The discharge of a charge of land is equivalent to a reconveyance of mortgaged property and it is therefore open to an applicant to proceed by way of originating summons under this rule. *Ponniah* v. *Chinniah*, [1961] M.L.J. 66, C.A."

Be that as it may we are of the view that failure to comply with the procedure laid down under the rules was only an irregularity curable under Order 70 rule 1 of the R.S.C. The learned judge who heard the summons-in-chambers did consider the appellant's preliminary objection nevertheless he chose to proceed with the respondent's application and had not given any direction on the matter. In the absence of any contrary direction the non-compliance with the rule cannot therefore be held to have rendered the proceedings void (O.70 r.1. R.S.C.).

It is perhaps pertinent to observe that the appellant had availed himself of the same proceedings to secure restitution. In that event, he should not himself be heard to object. The question of restitution was not raised by the appellant at the hearing before Anuar J. He merely prayed for an order for sale to satisfy the outstanding debt. The question of restitution was therefore not before the judge for him to effect a judicial determination. The sole issue of law before the learned judge was whether the moneylending transaction was illegal, void and unenforceable. The question of restitution was only raised in the proceedings commenced by the respondent heard by Yusoff J. The question in issue now is whether by reason of section 66 of the Contracts Act 1950 the appellant was entitled to recover money lent and interest thereon. Section 66 of the Contracts Act reads —

"66. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

On the authority of *Menaka* v. *Lum Kum Chum*[1] it is clear that even though the moneylending transaction is void and unenforceable by reason of the contravention of certain provisions of the Moneylender's Ordinance, there remains thereafter an issue for consideration whether a moneylender is entitled to recover the money lent under section 66 of the Contracts Act.

What necessarily emerges from that decision is that it is for the court in each case to determine whether or not the parties to a transaction are aware of the illegality at the time of making the loan transaction. It is also for the court to consider whether in all circumstances the loan transaction was concluded in good faith.

The question that must necessarily be decided is whether in all circumstances of this particular case it is proper to order restitution. It is not in dispute that there was an outstanding balance of $12,693.50. The respondent however, denied that the loan was free of interest. He alleged that he borrowed only $16,000 with interest at 36% p.a. amounting $5,760 making a grand total of $21,760.

The appellant's affidavit affirmed on May 22, 1980 reveals that he was at all material times, and still is, a licensed moneylender trading under the name of Hai Hong Moneylenders at No. 715, Main Road, Kulai, Johore. Although he contended that the loan was a friendly loan without interest he did not however affirm that he had no knowledge of the illegality. The appellant's solicitor, on the other hand, affirmed that he did not either remember that the appellant was in possession of a moneylender's licence or if he did, that the possession of the licence was relevant to the matter in issue. He also affirmed that it did not occur to him the charge required a memorandum of loan. He maintained that there was a *bona fide* mistake on his part.

It seems obvious that when Anuar J. dismissed the appeal he did so for the reason that the appellant had acted contrary to the provisions of the Moneylender's Ordinance and the loan transaction was therefore illegal, void and unenforceable. The affirmation made by the appellant's solicitor did not contain any averment to the effect that he would not have known of the illegality. What he did say was that he did not remember the appellant was in possession of a moneylender's licence and, if he did, he never considered whether it was relevant to the transaction. At any rate it never occurred to him that a memorandum of loan was required.

Even if we should hold that the appellant's solicitors had acted in good faith we are unable to say that the appellant himself had so acted. As a licensed moneylender for a period of years he could not have been ignorant of the fact that he had breached the Moneylender's Ordinance. In any event he has not said that he had no knowledge of the illegality.

For reasons we have stated it is our view that this appeal must necessarily fail and there should therefore be no order for restitution. It is accordingly dismissed with costs.

Appeal dismissed.

Solicitors: *T.S. Chong & Co.; Elyas Majeed.*

MOHAMED IBRAHIM & ANOR. v. CHRISTOPHER PIFF & ANOR.

[F.C. (Suffian L.P., Wan Suleiman & Chang Min Tat F.JJ.) October 28 & November 26, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 56 of 1979]

Tort — Accident resulting in brain damage — Damages — Special damages — Air passages for family to London and back — Expenses of special schooling — Whether appellate court should interfere with award of trial judge.

Damages — Brain injury — Special damages — Expenses of special schooling.

The second respondent, a school girl aged 7 years was involved in an accident whilst being driven in her father's car with a bus driven by the 1st appellant. The accident resulted in brain damage. Liability was admitted and the appeal was only on the quantum of damages. It was argued (a) that special damages for air passages to London and back for the whole family should be reduced; (b) that the sum of $65,000 awarded for the expenses of special schooling was far too much.

Held: (1) in the special circumstances of this case the special damages awarded for air passages for the family should remain unaltered;

(2) the sum awarded for the expenses of special schooling was justified.

Cases referred to:-

(1) *Schneider* v. *Eisovitch* [1960] 2 Q.B. 430.

(2) *Harris* v. *Harris* [1973] 1 LL L.R. 445.

(3) *Fletcher* v. *Autocar & Transporters Ltd.* [1968] 1 All E.R. 726.

(4) *Davies* v. *Powell Duffryn Associated Collieries* [1942] A.C. 601 at p. 616.

FEDERAL COURT.

Khoo Eng Chin (*Miss John* with him) for the appellants.

Cecil Abraham for the respondents.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the judgment of the Court): The 2nd respondent, a school girl aged 7 years was involved in an accident whilst being driven in her father's car with a bus driven by the 1st appellant. The accident resulted in brain damage. Liability was admitted by appellants, and evidence was adduced merely to decide on quantum.

This appeal arose out of appellants' dissatisfaction with the award on two items of special damages viz. cost of air passage for the whole family from Kuala Lumpur to London including that for the unconscious Allison, $10,866 Item (2), and cost of the return passage for the whole family from London to Kuala Lumpur, $6,016.50 Item (3). Two seats had to be allocated to Allison on the trip to London because of her unconscious state.

Mr. Khoo for the appellants contends that items (2) and (3) should be reduced. Though, in this family of five members, the other 2 children are 6 years and 2 years old, counsel says that only one parent need accompany the ailing child and the medical officer, whilst the other could stay at home to tend to the remaining two.

For the respondents, it was argued that the obvious choice would be the mother, if only one parent could go, which would mean that the father would have to stay away from work to care for the two young ones. There was no evidence to indicate whether the family had adequate household servants to do so on their own or whether additional staff would have to be employed. Mr. Abraham insisted that with the child in a coma, it was reasonable that both parents should be entitled to accompany her.

No argument as to how many members of the family should be entitled to claim under items (2) and (3) was raised before the trial judge. It is not in dispute that the passage of the whole family to England and back to this country was treated as home leave passage and was paid for by the firm.

However the appellants had even made an attempt for both these items, referred to as items (7) and (8) of the particulars of special damages, to be disallowed altogether, saying that the whole expense should be treated as home leave passage paid for by respondents' employers. In reply counsel for the respondents had countered that by being compelled to avail themselves of this enforced vacation they had deprived themselves of a real vacation which in the normal course of events, they would have taken later.

The learned trial judge had taken into account the fact that he sacrificed his home leave entitlement for himself and his family to enable him to finance Allison's transfer to England for proper treatment. It is indeed true that the 1st respondent and his family not only sacrificed the pleasures of a real home leave, for the parents at least must have spent a considerable period of their stay hovering around their ailing daughter. They had also effected some economies by obviating the need for additional household help which would otherwise be necessary to tend to their two younger children if the mother alone had accompanied Allison to England, and leaving the respondent to cope with his employment.

In short what the 1st respondent and his family did was equivalent to his taking the money his employers had set aside for the home leave passage, and spending that sum to accompany the daughter home in order to get her more specialised medical treatment, the journey having become necessary because of the act of negligence on the part of appellants. The respondents were entitled to reimburse-